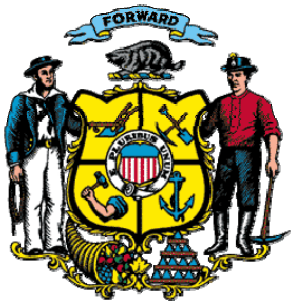
This brochure entitled *Information About Your Hearing, Class 2 – Disciplinary Proceeding* has been prepared by the Department of Regulation and Licensing (Department) to assist credential holders who have been named as respondents in disciplinary complaints filed against them by the Division of Enforcement of the Department. It provides information to common questions regarding the Class 2 – Disciplinary Proceeding process. **However, it is not intended to substitute for the legal advice and assistance of an attorney.**

Information About Your Hearing

Class 2 – Disciplinary Proceeding



Wisconsin Department of
Regulation and Licensing

Information About Your Hearing

Class 2 - Disciplinary Proceeding

A disciplinary complaint has been filed naming you as the respondent. This informational brochure has been prepared by the department to assist you by answering some common questions. **It is not intended to substitute for the legal advice and assistance of an attorney.**

Topics

The Complaint

The complaint charges you with a violation of a rule or a statute governing professional conduct, and it lists the specific acts which you are alleged to have committed which justify disciplinary action. In legal terms, the complaint is the formal document which gives you notice of what you must be prepared to defend or answer. You are now a "party" to this disciplinary proceeding called the "respondent". The Division of Enforcement within the Department of Regulation and Licensing (Department) is the other party called the "complainant". The hearing will be conducted by an administrative law judge (ALJ) who presides as judge (ruling on procedure, evidence, and objections) and as fact-finder. The mailing addresses for both the Division of Enforcement attorney and the ALJ are provided in the Notice of Hearing.

Your Right to be Represented

You may be represented prior to and at the hearing by an attorney, but you are not required to have one. You must make this decision, and if you decide to be represented in order to protect your legal rights, you must choose your own attorney. A disciplinary proceeding may result in revocation, suspension, or limitation of your professional credential. Neither the Division of Enforcement attorney nor the ALJ is allowed to recommend an attorney. The State Bar of Wisconsin offers a lawyer referral service that you may call at 800-362-9082. The ALJ cannot help you prepare or present your case.

The Answer

As the Notice of Hearing provides, <u>you are required by the rules of procedure to file a written Answer</u> within twenty days of the day the complaint was mailed. Filing requires you to send the original Answer to the ALJ assigned to hear your case along with a copy to the Division of Enforcement attorney whose name appears on the Notice. If meeting the 20-day deadline poses a problem for you, you should request an extension of time from the ALJ.

If you choose to prepare your own Answer, then it is important to respond in writing to every numbered paragraph of the Complaint and to sign it. You may "admit" the facts in a paragraph; you may "deny" the facts in a paragraph, adding any explanation that you think appropriate; or you may state that you have no basis for admitting or denying the facts, essentially saying that you do not know. You may also raise one or more issues which constitute a legal "defense" to the charges.

If you do not file an Answer, you will likely be found "in default" which means you have essentially admitted all of the allegations contained in the complaint. If you only respond to selected allegations, the others will be treated as if you admitted them.

Prehearing Conference(s)

The ALJ will usually conduct at least one prehearing conference which may be held by telephone. The purposes are to clear away any misunderstandings, to reach agreement on as many of the facts as possible, to identify the real issues to be addressed, to review the exchange of documents and the identification of witnesses, and to set a realistic schedule for the hearing. In addition, if you and the Division of Enforcement attorney have not already discussed the possibility of settling the case without a hearing, you may be encouraged to do that.

Even though you may contact the ALJ in certain circumstances, you should avoid what is called an *ex parte* communication. As the person who must listen impartially to the evidence, the ALJ must only consider facts and arguments which are presented to him or her at a time when both sides are present. Therefore, you may contact the ALJ with a procedural question, but any discussion of the "merits" of the case can only occur during a conference in which both parties participate.

Discovery and Documentary Evidence

You may want to use documents or other physical evidence to support your position. Under the rules of procedure for cases like this, each party has a right (with certain exceptions) to know what evidence the other party has. This is called "discovery". You may receive requests to provide documents or other information, and you may make similar requests of the Division of Enforcement attorney. If you need help understanding this, or if you encounter any difficulty obtaining information which you think you are entitled to, you may contact an attorney or the ALJ who can arrange a prehearing conference.

Witnesses and Subpoenas

You may want to call one or more witnesses to offer testimony to support your position or to identify and explain other documents. If so, you are responsible for having them appear. You may arrange for such witnesses to appear voluntarily at the hearing, or if a person will not agree to appear voluntarily, you may order him or her to appear for you by a subpoena. An attorney who you have hired to represent you can prepare a subpoena on your behalf, or you may contact the ALJ. If the ALJ issues a subpoena on your behalf, you must then arrange to have the subpoena served on the witness; you can do this yourself as long as you prepare an affidavit of service or you can have it done by the sheriff's office or a private process-server. Along with a subpoena, you must include payment to the witness of $5/day and 20¢/mile round trip for appearing. It is also a good idea to attach a map, such as the one attached to this brochure. A witness may be allowed to testify by phone; ask the ALJ about this well before the hearing date.

Just as each party may conduct discovery to find out what evidence will be used and introduced by the other party, the parties may be asked to disclose who they intend to call as witnesses. This may arise in a prehearing conference, or the ALJ may issue a specific order to exchange witness lists.

An Interpreter or other Accommodation

If you need an interpreter to help you understand the English language or if some accommodation would assist you to deal with a disability, please contact the ALJ, and he or she will attempt to arrange the hearing so that you can participate fully.

Settlement

Some cases are settled by an agreement between the parties called a "stipulation". You are free to respond to, or to contact, the attorney listed in the notice of hearing to discuss the possibility of compromise or other settlement. The rules encourage settlement negotiations by prohibiting their disclosure to the ALJ if the case eventually goes to a hearing.

The Hearing

Unless your case settles or is rescheduled, it will be heard on the date specified in the notice of hearing. You are not required to appear at the hearing. However, if you do not appear, the hearing will proceed without you, and the rules of procedure allow the ALJ to interpret your absence as your admission that all of the allegations of the complaint are true.

Assuming you appear, the hearing will be conducted much like a trial without a jury. The ALJ will preside as judge (ruling on procedure, evidence and objections) and as fact-finder.

Just as in a trial, each side gets a chance to start with an opening statement (a short summary explaining what its general position is) and then to present evidence. The Division of Enforcement attorney first presents his or her witnesses and other evidence, and then you may do the same. Each witness can be questioned by both parties: first the party who calls the witness asks questions (direct examination), then the other party asks questions (cross examination), then each party gets an opportunity to ask follow-up questions (re-direct and re-cross examination).

The evidence may be in documents or in testimony from witnesses. You may testify for yourself, and you may be called as a witness by the attorney for the Division of Enforcement. (Although the Fifth Amendment protection against self-incrimination applies only to the disclosure of facts which would subject you to criminal prosecution, please be aware that if you do refuse to testify, the ALJ in a disciplinary hearing is permitted to draw a negative inference from that refusal.) Some rules of evidence may limit what can be introduced, but no attempt will be made to explain all the rules here. If you anticipate any problem, such as whether a certain document will be admitted or certain testimony allowed, you or your attorney should contact the ALJ so that the issue can be discussed in a prehearing conference.

After all the evidence has been presented, each side may make a closing argument, which is an opportunity to comment on the evidence that has been presented, such as explaining how much credit should be given to certain testimony, or explaining otherwise confusing evidence. It is also each side's opportunity to argue what discipline, if any, would be appropriate.

You do not have to "prove your case". The Division of Enforcement has the burden of proving that the allegations in the complaint are true, and it cannot add other charges against you which were not in the complaint, unless the complaint is formally amended. The hearing will be recorded and you will be able to purchase a copy of the transcript from the court reporting service if you wish.

Rescheduling, Continuing, Adjourning

If a good reason is shown by either party, the ALJ can reschedule the hearing, and a telephone conference may be held to set a new date.

Once a hearing has started, the ALJ may continue it on another day if more time is necessary.

If your case settles, the ALJ will usually adjourn the hearing, not canceling it entirely, but taking it off the calendar until the settlement is approved by the Department or board.

The Decision

The final decision-maker in your case is the Department or board (depending on the profession). Once the hearing is completed, the ALJ is responsible for preparing a Proposed Decision which sets out all the facts of the case, which recites the laws (statutes and administrative rules) that govern the case, and which applies those laws to the facts. The ultimate questions to be answered are whether the charges in the complaint were proven, whether those charges constitute violations of the statute or rule in question, and, if so, what discipline would be appropriate. The discipline available varies by profession, but typically includes a public reprimand, a suspension of your credential for a period of time, limitations on your practice, or revocation of the credential. Certain boards are authorized to impose money forfeitures, and the cost of the disciplinary proceeding may also be imposed on the respondent.

The proposed decision must be in writing for the Department or board to review, and the ALJ often waits until the transcript of the hearing is prepared before writing it. This means that the proposed decision may not be completed until a month or more after the hearing.

Once the proposed decision is filed, it will be sent to you and the Division of Enforcement attorney, and you will be notified of a time (no less than ten days) in which you may file written objections to be considered by the Department or board before it makes its final decision. You will then receive a copy of

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CHAPTER RL 2

PROCEDURES FOR PLEADING AND HEARINGS

RL 2.01 Authority. The rules in ch. RL 2 are adopted pursuant to authority in s. 440.03 (1), Stats., and procedures in ch. 227, Stats.

RL 2.02 Scope; kinds of proceedings. The rules in this chapter govern procedures in class 2 proceedings, as defined in s. 227.01 (3) (b), Stats., against licensees before the department and all disciplinary authorities attached to the department, except that s. RL 2.17 applies also to class 1 proceedings, as defined in s. 227.01 (3) (a), Stats.

RL 2.03 Definitions. In this chapter:

(1) Complainant" means the person who signs a complaint.

(2) Complaint" means a document which meets the requirements of ss. RL 2.05 and 2.06.

(3) Department" means the department of regulation and licensing.

(4) Disciplinary authority" means the department or the attached examining board or board having authority to revoke the license of the holder whose conduct is under investigation.

(5) Disciplinary proceeding" means a proceeding against one or more licensees in which a disciplinary authority may determine to revoke or suspend a license, to reprimand a licensee, to limit a license, to impose a forfeiture, or to refuse to renew a license because of a violation of law.

(6) Division" means the division of enforcement in the department.

(7) Informal complaint" means any written information submitted to the division or any disciplinary authority by any person which requests that a disciplinary proceeding be commenced against a licensee or which alleges facts, which if true, warrant discipline.

(8) Licensee" means a person, partnership, corporation or association holding any license, permit, certificate or registration granted by a disciplinary authority or having any right to renew a license, permit, certificate or registration granted by a disciplinary authority.

(9) Respondent" means the person against whom a disciplinary proceeding has been commenced and who is named as respondent in a complaint.

(10) Settlement conference" means a proceeding before a disciplinary authority or its designee conducted according to s. RL 2.036, in which a conference with one or more licensee is held

to attempt to reach a fair disposition of an informal complaint prior to the commencement of a disciplinary proceeding.

RL 2.035 Receiving informal complaints. All informal complaints received shall be referred to the division for filing, screening and, if necessary, investigation. Screening shall be done by the disciplinary authority, or, if the disciplinary authority directs, by a disciplinary authority member or the division. In this section, screening is a preliminary review of complaints to determine whether an investigation is necessary. Considerations in screening include, but are not limited to:

(1) Whether the person complained against is licensed;
(2) Whether the violation alleged is a fee dispute;
(3) Whether the matter alleged, if taken as a whole, is trivial; and
(4) Whether the matter alleged is a violation of any statute, rule or standard of practice.

RL 2.036 Procedure for settlement conferences. At the discretion of the disciplinary authority, a settlement conference may be held prior to the commencement of a disciplinary proceeding, pursuant to the following procedures:

(1) SELECTION OF INFORMAL COMPLAINTS. The disciplinary authority or its designee may determine that a settlement conference is appropriate during an investigation of an informal complaint if the information gathered during the investigation presents reasonable grounds to believe that a violation of the laws enforced by the disciplinary authority has occurred. Considerations in making the determination may include, but are not limited to:
   (a) Whether the issues arising out of the investigation of the informal complaint are clear, discrete and sufficiently limited to allow for resolution in the informal setting of a settlement conference; and
   (b) Whether the facts of the informal complaint are undisputed or clearly ascertainable from the documents received during investigation by the division.
(2) PROCEDURES. When the disciplinary authority or its designee has selected an informal complaint for a possible settlement conference, the licensee shall be contacted by the division to determine whether the licensee desires to participate in a settlement conference. A notice of settlement conference and a description of settlement conference procedures, prepared on forms prescribed by the department, shall be sent to all participants in advance of any settlement conference. A settlement conference shall not be held without the consent of the licensee. No agreement reached between the licensee and the disciplinary authority or its designee at a settlement conference which imposes discipline upon the licensee shall be binding until the agreement is reduced to writing, signed by the licensee, and accepted by the disciplinary authority.
(3) ORAL STATEMENTS AT SETTLEMENT CONFERENCE. Oral statements made during a settlement conference shall not be introduced into or made part of the record in a disciplinary proceeding.

RL 2.037 Parties to a disciplinary proceeding. Parties to a disciplinary proceeding are the respondent, the division and the disciplinary authority before which the disciplinary proceeding is heard.

RL 2.04 Commencement of disciplinary proceedings. Disciplinary proceedings are commenced when a notice of hearing is filed in the disciplinary authority office or with a designated administrative law judge.

RL 2.05 Pleadings to be captioned. All pleadings, notices, orders, and other papers filed in disciplinary proceedings shall be captioned: "BEFORE THE _____" and shall be entitled: "IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST _____, RESPONDENT."

RL 2.06 Complaint. A complaint may be made on information and belief and shall contain:

(1) The name and address of the licensee complained against and the name and address of the complainant;
(2) A short statement in plain language of the cause for disciplinary action identifying with reasonable particularity the transaction, occurrence or event out of which the cause arises

and specifying the statute, rule or other standard alleged to have been violated;

(3) A request in essentially the following form: "Wherefore, the complainant demands that the disciplinary authority hear evidence relevant to matters alleged in this complaint, determine and impose the discipline warranted, and assess the costs of the proceeding against the respondent;" and,

(4) The signature of the complainant.

RL 2.07 Notice of hearing.

(1) A notice of hearing shall be sent to the respondent at least 10 days prior to the hearing, unless for good cause such notice is impossible or impractical, in which case shorter notice may be given, but in no case may the notice be provided less than 48 hours in advance of the hearing.

(2) A notice of hearing to the respondent shall be substantially in the form shown in Appendix 1 and signed by a disciplinary authority member or an attorney in the division.

RL 2.08 Service and filing of complaint, notice of hearing and other papers.

(1) The complaint, notice of hearing, all orders and other papers required to be served on a respondent may be served by mailing a copy of the paper to the respondent at the last known address of the respondent or by any procedure described in s. 801.14 (2), Stats. Service by mail is complete upon mailing.

(2) Any paper required to be filed with a disciplinary authority may be mailed to the disciplinary authority office or, if an administrative law judge has been designated to preside in the matter, to the administrative law judge and shall be deemed filed on receipt at the disciplinary authority office or by the administrative law judge. An answer under s. RL 2.09, and motions under s. RL 2.15 may be filed and served by facsimile transmission. A document filed by facsimile transmission under this section shall also be mailed to the disciplinary authority. An answer or motion filed by facsimile transmission shall be deemed filed on the first business day after receipt by the disciplinary authority.

RL 2.09 Answer.

(1) An answer to a complaint shall state in short and plain terms the defenses to each cause asserted and shall admit or deny the allegations upon which the complainant relies. If the respondent is without knowledge or information sufficient to form a belief as to the truth of the allegation, the respondent shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. The respondent shall make denials as specific denials of designated allegations or paragraphs but if the respondent intends in good faith to deny only a part or a qualification of an allegation, the respondent shall specify so much of it as true and material and shall deny only the remainder.

(2) The respondent shall set forth affirmatively in the answer any matter constituting an affirmative defense.

(3) Allegations in a complaint are admitted when not denied in the answer.

(4) An answer to a complaint shall be filed within 20 days from the date of service of the complaint.

RL 2.10 Administrative law judge.

(1) DESIGNATION. Disciplinary hearings shall be presided over by an administrative law judge employed by the department unless the disciplinary authority designates otherwise. The administrative law judge shall be an attorney in the department designated by the department general counsel, an employee borrowed from another agency pursuant to s. 20.901, Stats., or a person employed as a special project or limited term employee by the department, except that the administrative law judge may not be an employee in the division.

(2) AUTHORITY. An administrative law judge designated under this section to preside over any disciplinary proceeding has the authority described in s. 227.46 (1), Stats. Unless otherwise directed by a disciplinary authority pursuant to s. 227.46 (3), Stats., an administrative law judge presiding over a disciplinary proceeding shall prepare a proposed

decision, including findings of fact, conclusions of law, order and opinion, in a form that may be adopted as the final decision in the case.

(3) SERVICE OF PROPOSED DECISION. Unless otherwise directed by a disciplinary authority, the proposed decision shall be served by the administrative law judge on all parties with a notice providing each party adversely affected by the proposed decision with an opportunity to file with the disciplinary authority objections and written argument with respect to the objections. A party adversely affected by a proposed decision shall have at least 10 days from the date of service of the proposed decision to file objections and argument.

RL 2.11 Prehearing conference. In any matter pending before the disciplinary authority the complainant and the respondent, or their attorneys, may be directed by the disciplinary authority or administrative law judge to appear at a conference or to participate in a telephone conference to consider the simplification of issues, the necessity or desirability of amendments to the pleadings, the admission of facts or documents which will avoid unnecessary proof and such other matters as may aid in the disposition of the matter.

RL 2.12 Settlements. No stipulation or settlement agreement disposing of a complaint or informal complaint shall be effective or binding in any respect until reduced to writing, signed by the respondent and approved by the disciplinary authority.

RL 2.13 Discovery. The person prosecuting the complaint and the respondent may, prior to the date set for hearing, obtain discovery by use of the methods described in ch. 804, Stats., for the purposes set forth therein. Protective orders, including orders to terminate or limit examinations, orders compelling discovery, sanctions provided in s. 804.12, Stats., or other remedies as are appropriate for failure to comply with such orders may be made by the presiding officer.

RL 2.14 Default. If the respondent fails to answer as required by s. RL 2.09 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence. The disciplinary authority may, for good cause, relieve the respondent from the effect of such findings and permit the respondent to answer and defend at any time before the disciplinary authority enters an order or within a reasonable time thereafter.

RL 2.15 Conduct of hearing.

(1) PRESIDING OFFICER. The hearing shall be presided over by a member of the disciplinary authority or an administrative law judge designated pursuant to s. RL 2.10.

(2) RECORD. A stenographic, electronic or other record shall be made of all hearings in which the testimony of witnesses is offered as evidence.

(3) EVIDENCE. The complainant and the respondent shall have the right to appear in person or by counsel, to call, examine, and cross-examine witnesses and to introduce evidence into the record.

(4) BRIEFS. The presiding officer may require the filing of briefs.

(5) MOTIONS. All motions, except those made at hearing, shall be in writing, filed with the presiding officer and a copy served upon the opposing party not later than 5 days before the time specified for hearing the motion.

(6) ADJOURNMENTS. The presiding officer may, for good cause, grant continuances, adjournments and extensions of time.

(7) SUBPOENAS.

(a) Subpoenas for the attendance of any witness at a hearing in the proceeding may be issued in accordance with s. 885.01, Stats. Service shall be made in the manner provided in s. 805.07 (5), Stats. A subpoena may command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.

(b) A presiding officer may issue protective orders according to the provision the provisions of s. 805.07, Stats.

(8) LOCATION OF HEARING. All hearings shall be held at the offices of the department of regulation and licensing in Madison unless the presiding officer determines that the health or safety of a witness or of a party or an emergency requires that a hearing be held elsewhere.

RL 2.16 Witness fees and costs. Witnesses subpoenaed at the request of the division or the disciplinary authority shall be entitled to compensation from the state for attendance and travel as provided in ch. 885, Stats.

RL 2.17 Transcription fees.

(1) The fee charged for a transcript of a proceeding under this chapter shall be computed by the person or reporting service preparing the transcript on the following basis:

(a) If the transcript is prepared by a reporting service, the fee charged for an original transcription and for copies shall be the amount identified in the state operational purchasing bulletin which identifies the reporting service and its fees.

(b) If a transcript is prepared by the department, the department shall charge a transcription fee of $1.75 per page and a copying charge of $.25 per page. If 2 or more persons request a transcript, the department shall charge each requester a copying fee of $.25 per page, but may divide the transcript fee equitably among the requesters. If the department has prepared a written transcript for its own use prior to the time a request is made, the department shall assume the transcription fee, but shall charge a copying fee of $.25 per page.

(2) A person who is without means and who requires a transcript for appeal or other reasonable purposes shall be furnished with a transcript without charge upon the filing of a petition of indigency signed under oath.

RL 2.18 Assessment of costs.

(1) The proposed decision of an administrative law judge following hearing shall include a recommendation whether all or part of the costs of the proceeding shall be assessed against the respondent.

(2) If a respondent objects to the recommendation of an administrative law judge that costs be assessed, objections to the assessment of costs shall be filed, along with any other objections to the proposed decision, within the time established for filing of objections.

(3) The disciplinary authority's final decision and order imposing discipline in a disciplinary proceeding shall include a determination whether all or part of the costs of the proceeding shall be assessed against the respondent.

(4) When costs are imposed, the division and the administrative law judge shall file supporting affidavits showing costs incurred within 15 days of the date of the final decision and order. The respondent shall file any objection to the affidavits within 30 days of the date of the final decision and order. The disciplinary authority shall review any objections, along with the affidavits, and affirm or modify its order without a hearing.

RL 2.20 Extension of time limits in disciplinary actions against physicians.

(1) AUTHORITY AND PURPOSE. The rules in this section are adopted under the authority of ss. 15.08 (5) (b), 227.11 (2) and 448.02 (3) (cm), Stats., to govern the extension of time limits in disciplinary actions against physicians.

(2) COMPUTING TIME LIMITS. In computing time limits under s. 448.02 (3) (cm), Stats., the date of initiating an investigation shall be the date of the decision to commence an investigation of an informal complaint following the screening of the informal complaint under s. RL 2.035, except that if the decision to commence an investigation of an informal complaint is made more than 45 days after the date of receipt of the informal complaint in the division, or if no screening of the informal complaint is conducted, the time for initiating an investigation shall commence 45 days after the date of receipt of the informal complaint in the division. The date that the medical examining board initiates a disciplinary action shall be the date that a disciplinary proceeding is commenced under s. RL 2.04.

(3) PROCEDURE FOR REQUESTING AN EXTENSION OF TIME. The medical examining

board or the division on behalf of the medical examining board shall make a written request for an extension of time under s. 448.02 (3) (cm), Stats., to the secretary of the department of regulation and licensing and shall state all of the following:

(a) The nature of the investigation and the date of initiating the investigation.

(b) The number of days the medical examining board requires as an extension in order to determine whether a physician is guilty of unprofessional conduct or negligence in treatment and to initiate disciplinary action.

(c) The reasons why the medical examining board has not made a decision within the time specified under s. 448.02 (3) (cm), Stats.

(4) FACTORS TO BE CONSIDERED. In deciding whether to grant or deny a specified extension of time for the medical examining board to determine whether a physician is guilty of unprofessional conduct or negligence in treatment, the secretary of the department of regulation and licensing shall consider the information set forth in the request and at least the following factors:

(a) The nature and complexity of the investigation including the cause of any delays encountered during the investigation.

(b) Whether delays encountered during the screening of the complaint or the complaint handling process were caused in whole or part by the fact that record custodians, witnesses, or persons investigated did not make a timely response to requests for records or other evidence.

(c) Whether civil or criminal litigation relating to the matter investigated caused any delay in the investigation.

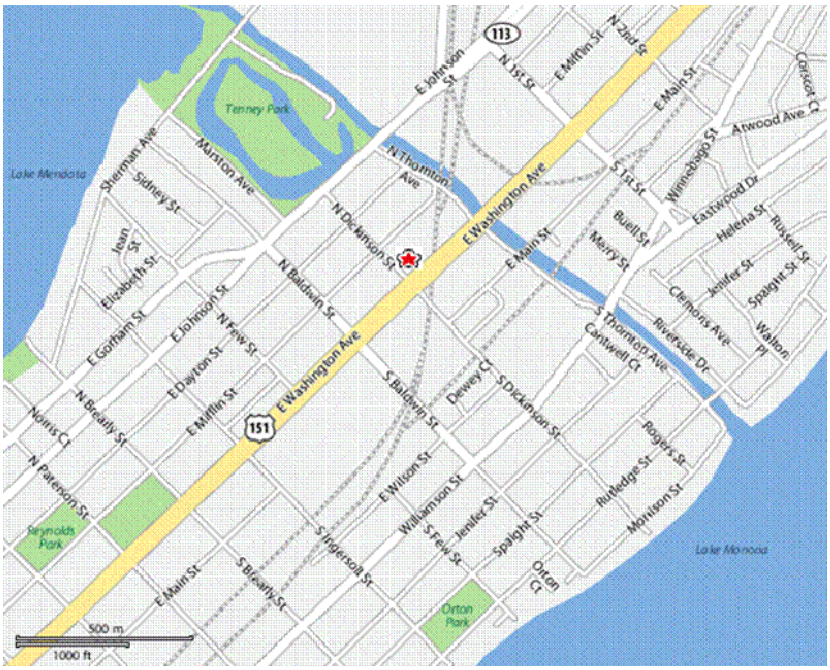
(d) The quality and complexity of evidence available to the medical examining board.

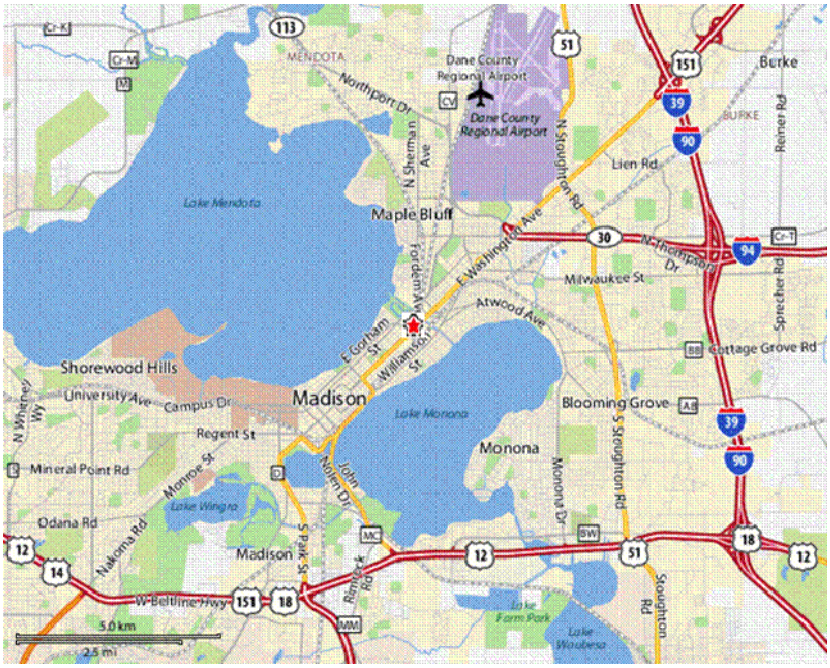
(e) The extent to which the physician will be prejudiced by an extension of time.

(f) The potential harm to the public if the investigation is terminated without a determination of whether the physician complained about is guilty of unprofessional conduct or negligence in treatment.

(5) APPROVE OR DENY AN EXTENSION. The secretary of the department of regulation and licensing shall approve or deny a request for an extension within 20 days of receipt. A request not approved within 20 days shall be deemed denied.

MAPS





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